IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 1542/2022**

In the matter between:

THE ATTORNEY GENERAL	Applicant
And	
HEAVY PLANT CENTRE (PTY) LTD	Respondent
In Re:	
HEAVY PLANT CENTRE (PTY) LTD	Plaintiff
And	
MICROPROJECTS COORDINATION UNIT	1st Defendant
THE MINISTRY OF ECONOMIC PLANNING & DEVELOPMENT	2nd Defendant
THE MINISTRY OF TINKHUNDLA ADMINISTRATION AND DEVELOPMENT	3rd Defendant
THE ATTORNEY GENERAL	4th Defendant

Neutral Citation: The Attorney General N.O. *v Heavy Plant Centre (Pty) Ltd In Re: Heavy Plant Centre (Pty) Ltd v Microprojects Coordination Unit & 3 Others (1542/2022) [2023] SZHC 370 (12 December 2023)*

CORAM: **N.M. MASEKO J**

FOR PLAINTIFF: **ATTORNEY L.B. NKAMBULE**

FOR DEFENDANTS: **ATTORNEY B. MKHONTA**

HEARD: **01/11/2022**

DELIVERED: **12/12/2023**

Preamble: Civil Law and Procedure – Rescission of judgment granted by default – Plaintiff's failure to comply with rule 19 (2) of the Rules of Court, and also failure to comply with Section 2 (1) (a) of the Limitation of Legal Proceedings Against the Government Act of 1972. The rescission of the judgment is hereby granted.

RULING ON RESCISION OF JUDGMENT BY DEFAULT

MASEKO J

[1] The Plaintiff Heavy Plant Centre (Pty) Ltd. Sued out a Combined Summons against the Defendants on the 12/08/22 for payment of E785 085-10 (Seven Hundred and Eighty Five Thousand, Eight Five Emalangeni, Ten Cents) in respect of goods sold and delivered at the sole instance and request of the Defendant(s). Further prayers in respect of 3% prime interest per month to date 10% collection commission as well as costs of suit on attorney and client scale.

[2] The aforesaid Summons was served on the Defendants on the 29th August 2022. On the 27th September 2022 the Plaintiff filed an application for judgment by default, and on the 29th September 2022 this Court granted the judgment by default.

[3] On the 11th October 2022, a Writ of Execution was issued by the Registrar of this Court, however, it appears that this was prompted by the Defendants who has filed an application on 10/10/22 for rescission of the judgment by default. For ease of reference, I will refer to the parties as Plaintiff and Defendants respectively in these rescission proceedings.

[4] The Plaintiff raised points *in limine* which were argued by both parties. These are:-

(i) that the Defendants in particular The 4th Defendant has no *locus standi* to institute the above proceedings as no order has been sought against the Applicant;

(ii) application for rescission does not qualify or comply with Rule 6 (10) of the Rules of Court because it is not dated and the order sought to be rescinded has not been attached;

(iii) Applicant has failed to furnish security for costs as per Rule 31 (3) (b) of the Rules of Court in these rescission proceedings.

[5] As regards the point *in limine* that the 4th Defendant has no locus standi because no order has been sought against him, has no merit because the 4th Defendant is and must always be cited in any proceedings against Government. As regards non attachment of the order sought to be rescinded, again this argument has no merit because any annexure omitted is easily tendered or filed alone before Court, this is being over technical, and as regards the security for costs in terms of Rule 31 (3) (b), I have observed when perusing the papers and oral arguments in this matter that the Defendants were prematurely brought before Court and therefore, in my view, *in casu* the issue of security for costs simply falls away. The same goes for the point *in limine* on lack of urgency, I also dismiss this point.

ON THE MERITS

[6] Ms B. Mkhonta made convincing submissions on the dies to be afforded Government when a civil suit is being instituted against Government. She submitted that the Plaintiff has not complied with Rule 19 (2) which provides as follows:-

> *"19 (2)In actions against the Government, or against any office or servant thereof in his capacity as such, the time to be allowed for delivery of Notice of Intention to Defend shall be not less than twenty days after service of the summons, unless in any case the Court has specially authorised a shorter period."*

In casu there is no short period that was authorised by this Court.

[7] *In casu* the Combined Summons was served on the Defendants on the 20th August 2022. The Defendants were informed to file their Notice to Defend within ten (10) days, and this is clearly wrong since it is not in compliance with Rule 19 (2) of the Rules of Court. The Plaintiff ought to have given the Defendants the not less than twenty (20 days *dies*

within which to file their Notice to Defend. The twenty (20) days would have expired on the 28th September 2022, and *in casu* the Application for Judgment by Default was filed on the 27th September 2022 and the said judgment was granted on the 29th September 2022.

[8] I accept Ms Mkhonta's submissions that the Plaintiff did not comply with Rule 19 (2) of the Rules of this Court in so far as the expiry of the *dies* is concerned. This in my view is a fundamental flaw in the Plaintiff's case and resulted to a judgment by default granted in error by this Court as per Rule 42 (1) (a) which provides as follows:-

> *"42 (1)The Court may in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind, or vary*
>
> > *(a) an order or judgment erroneously granted in the absence of any party affected thereby."*

[9] Ms Mkhonta referred to the case of **Lusa Investments (Pty) Ltd v Ministry of Education and Training and Two Others Case No. 1943/16 [2017] SZHC 37 (February 2017)** Mlangeni J stated the following at paras 5 and 7:-

> *"[5] The Defendants submit that the Plaintiff, as dominis litis, should have specified a date upon which the Notice was to be filed, such being no less than twenty days after service of the summons. Legal practitioners are aware that such date is based upon estimation of when the process is likely to have been served, allowing a certain margin of error. There is no doubt that has the Plaintiff been alive to the required* ***'dies'*** *at the time of issuing the summons it would certainly have done better. For instance, it could have stipulated that Notice to Defend is to be served and filed on or before the 7th December 2016 if such date was after the twentieth day after service of summons. The Plaintiff's ineptitude could well give a Defendant an indefinite number of days, as long as it is* ***'not less than twenty days.'***

[7] My conclusion is that by failing to give a proper date for the filing of a Notice of Intention to Defend the Plaintiff is the author of its own troubles. It cannot place them on the Defendant's door step for filing the Notice on the 23rd day – only two days after the minimum allowed. The Plaintiff's argument that the Defendants ought to have filed the Notice on or before 6th December 2016 is erroneous, as it presupposes the need to file within twenty days, which is not the case. I am of the view that the Attorney General was sufficiently diligent, and Rule 30 does not apply."

[10] The explanation by the Defendants that they did not deliver the Notice of Intention to Defend because the *dies* for delivery of same has not expired is reasonable in the circumstances and I accept such explanation. The Defendants further argue that the Plaintiff failed to comply with Section 2 (1) (a) of The Limitation of Proceedings Against the Government Act of 1972, which provides as follows:-

"2 (1) Subject to Section 3 no legal proceedings shall be instituted against Government in respect of any debt –

(a) unless a written demand claiming payment of the alleged debt and setting out the particulars of such debt and cause of action from which it arose, has been served on the Attorney General by delivery or by registered post.

Provided that in the case of a debt arising from a delict such demand shall be served within ninety days from the day on which the debt became due."

[11] In response to the allegation of non-compliance with The Limitations of Proceedings Against the Government Act, the Plaintiff argues that even if that were the case, such failure to comply cannot give rise to a rescission of the judgment as sought by the Defendants. This is a very wrong perception by the Plaintiff, because Section 2 thereof is mandatory and/or peremptory to any person who intends to institute proceedings against the Government for the recovery of a debt.

[12] In the case of **Sindi Ndwandwe v The Principal Secretary Ministry of Health and Another (1647/2012) [2014] SZHC 126 (19th June 2014)**, Hlophe J (as he then was) stated as follows at paras 19 and 21:-

> *"[19] It is clear that in this jurisdiction the issuing and serving of demand prior to the institution of proceedings is a requirement of statute and is peremptory from the reading of the relevant section as it uses the word* ***"shall"****. There is therefore no ambiguity on the statutory requirement in this regard and therefore no interpretation is called for.*
>
> *[21] On the question of the propriety of the filing of the demand and its effect, I can only agree with Defendant's Counsel. The opening of the section expresses the opinion unambiguously, that no legal proceedings shall be instituted against the Government in respect of any debt without a demand having been issued and served on the Attorney General, who is the legal Representative of the Government. To remove any further doubt there could be, the section makes it clear how the service of the demand should be. That is it should be by delivery on the Attorney General or be by registered post."*

CONCLUSION

[13] It is my considered view firstly that the Plaintiff failed to comply with Section 2 (1) (a) of The Limitation of Proceedings Against the Government Act, which is a peremptory section, by failing to issue and serve a demand to the Attorney General by delivering or by registered post.

[14] Secondly, the Plaintiff failed to comply with Rule 19 (2) of the Rules of Court by not affording the Defendants the **"not less than twenty days"** within which to file a Notice to Defend and instead set the matter for judgment by default when the *dies* for filing the Notice to Defend by the Defendants has not expired.

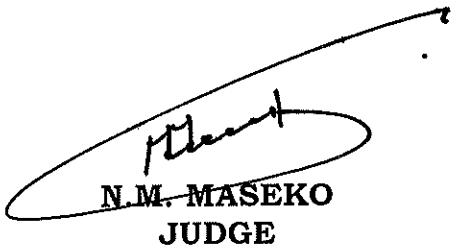
[15] Thirdly, I accept the reasons for the failure none filing of the Notice to Defend by the Defendants, and that is, the *dies* for filing the Notice to Defend had not expired. The matter was prematurely set for judgment by default and also the Plaintiff did not give the Defendant the requisite *dies* in terms of Rule 19 (2) of the Rules of Court to file their Notice of Intention to Defend the aforesaid action proceedings.

[16] Consequently,

1. The judgment by default granted by this Court on the 29th September 2022 bearing the Registrar of the High Court's stamp of the 3rd October 2022 is hereby rescinded and set aside.

2. The Defendants are granted leave to defend this matter.

3. Costs to be costs in the main trial.



N.M. MASEKO
JUDGE